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15
16 **UNITED STATES DISTRICT COURT**
17
FOR THE NORTHERN DISTRICT OF CALIFORNIA
18
SAN FRANCISCO DIVISION

19 JAMES GROSS, individually and on behalf of
all others similarly situated,

20 *Plaintiff,*

21 *v.*

22 SYMANTEC CORPORATION, a Delaware
corporation, and PC TOOLS, LTD., an Irish
23 limited company,

24 *Defendants.*

Case No. 3:12-cv-00154-CRB

**JOINT NOTICE OF AND REQUEST
TO APPROVE *CY PRES* RECIPIENTS**

Date: October 4, 2013

Time: 10:00 a.m.

Location: Courtroom 6, 17th Floor

Judge: Honorable Charles R. Breyer

1 **I. INTRODUCTION**

2 On May 28, 2013, the Court granted preliminary approval to the class settlement reached
 3 between plaintiff and defendants in this action (“the Settlement”), finding the Settlement to be
 4 “fair, reasonable, and adequate, and within the range of possible approval.” ECF No. 70 ¶ 2.
 5 Pursuant to the Court’s instruction given during the preliminary approval process, the parties
 6 amended the Settlement to include a potential *cy pres* benefit in Section XI.C of the Settlement
 7 Agreement. ECF No. 68-1. This section provides that if the Court approves a Fee Award to Class
 8 Counsel that is less than the maximum amount allowed by the Settlement, “the Court shall have
 9 discretion to designate for *cy pres* distribution a portion of the Settlement Fund equal to or less
 10 than the difference between the actual Fee Award and the maximum allowable Fee Award.” *Id.* at
 11 2. In granting preliminary approval to the amended Settlement, the Court instructed the parties to
 12 “jointly submit to the Court a list of proposed recipients of any potential *cy pres* distribution,
 13 including any proposals for allocation among *cy pres* recipients.” ECF No. 70 ¶ 6.

14 Per the Court’s Order, the Parties have now considered and conferred regarding several
 15 proposed *cy pres* recipients, including reviewing written proposals regarding their intended use of
 16 any funds they might receive. After carefully considering the proposals and conferring with the
 17 organizations themselves, the Parties were unable to reach an agreement on which organizations to
 18 propose. Because the parties have been unable to reach agreement on a joint list of potential *cy*
 19 *pres* recipients, each party separately proposes the following potential recipients:

20 Plaintiff’s Proposed *Cy Pres* Recipients

- 21 1. The U.C. Berkeley Center for Law and Technology
- 22 2. The Rose Foundation
- 23 3. Consumer Watchdog

24 Defendants’ Proposed *Cy Pres* Recipients

- 25 1. National Cyber Security Alliance
- 26 2. Girls STEM Network: Cybersecurity
- 27 3. Common Sense Media

1 The parties leave it to the Court’s discretion to select all or less than all of the proposed
 2 recipients to receive a share of any *cy pres* distribution under Section XI.C of the Settlement
 3 Agreement.

4 **II. STANDARD FOR APPROVAL OF *CY PRES* DISTRIBUTION AND RECIPIENTS.**

5 At its most basic, “[a] *cy pres* remedy...is a settlement structure wherein class members
 6 receive an indirect benefit (usually through defendant donations to a third party) rather than a
 7 direct monetary payment.” *Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012). A *cy pres*
 8 distribution is appropriate if it bears a “substantial nexus to the interests of the class members.” *Id.*
 9 at 821. A “substantial nexus” exists if the *cy pres* recipients are “the ‘next best’ class of
 10 beneficiaries” and if the *cy pres* distribution “account[s] for the nature of the plaintiffs’ lawsuit,
 11 the objectives of the underlying statutes, and the interests of the silent class members.” *Id.*
 12 (quoting *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1036 (9th Cir. 2011)).

13 **III. PLAINTIFF GROSS’S PROPOSED *CY PRES* RECIPIENTS.**

14 For his part, Plaintiff proposes three organizations as potential recipients of any *cy pres*
 15 award here: (i) The U.C. Berkeley Center for Law and Technology (“BCLT”), (ii) The Rose
 16 Foundation, and (iii) Consumer Watchdog. It’s Plaintiff’s position that a *cy pres* distribution to
 17 any (or all) of these organizations would easily meet the requirements under the Ninth Circuit’s
 18 well-established standards for making such awards in class action settlements. First, the funds to
 19 be distributed are “unclaimed” inasmuch as they will be paid from the Settlement Fund, but were
 20 not otherwise distributed to class members (e.g., in the form of claims payments or attorneys’
 21 fees). And as explained below, if they are selected, the work performed by each of Plaintiff’s
 22 proposed recipients also dovetails with the primary issues in this litigation and the interests of the
 23 Settlement Class—namely, educating consumers about the pitfalls of potentially misleading online
 24 advertising and ensuring that those consumers don’t fall prey to consumer-technology and
 25 software companies utilizing such practices.

26 To the latter point and in particular, BCLT is a leading institution for research, education,
 27 and policy development in consumer protection, privacy law, and e-commerce, and is home to
 28

1 some of the most prominent faculty members and policy makers on these issues in the country.
2 With respect to the issues in this litigation, BCLT is conducting ongoing studies regarding the
3 kinds of promotional materials and testimonials for consumer products typically found on the
4 Internet (like those at issue here), and how they affect consumers' decision-making when
5 purchasing products online. The ultimate expectation for and focus of the study is on influencing
6 the development of consumer protection laws throughout the country—e.g., better informing the
7 “reasonable person” standard typically considered by courts in deceptive advertising cases like this
8 one. BCLT intends to use any *cy pres* distribution it may receive to expand its current efforts by (i)
9 collecting larger samples of consumers, (ii) diversifying the demographic reach of its studies, and
10 (iii) investigating a broader array of questions relevant to online consumer protection. (*See*
11 *Proposal of the U.C. Berkeley Center for Law and Technology*, attached as Exhibit 1.)

12 Next, The Rose Foundation is a grant making public charity with extensive experience in
13 receiving and administering *cy pres* and restitution funds. The Foundation has been named by
14 courts to receive funds from more than 300 consumer and environmental *cy pres* awards, and has
15 used these funds to award more than \$20 million to consumer, community and environmental
16 organizations throughout California and the country. On the consumer-side, The Foundation
17 operates its Consumer Protection Grants Fund, which is focused on issuing grants to organizations
18 that promote various consumer awareness projects, including educating consumers regarding
19 banking and finance issues, on-line consumer privacy, and protections against identify theft. With
20 that extensive experience creating, organizing and managing such grants, The Foundation intends
21 to use any *cy pres* distribution it may receive here to award grants to highly-qualified consumer
22 education projects directed towards educating consumers about how to recognize (and avoid if
23 need be) the software product marketing tactics and performance claims like those at issue in this
24 case. (*See Proposal of The Rose Foundation*, attached as Exhibit 2.)

25 For its part, Consumer Watchdog is an organization dedicated to educating and advocating
26 on behalf of consumers through policy research, investigation, public education, advocacy
27 (including litigation), and direct consumer outreach. With respect to the relevant issues in this
28

1 case, Consumer Watchdog has advanced initiatives to educate, advocate for, and protect
 2 consumers against potentially fraudulent and misleading marketing and sales tactics utilized by
 3 consumer-technology and software companies. Consumer Watchdog intends to use any *cy pres*
 4 distribution it may receive to bolster its efforts in (i) hiring additional staff to allow better
 5 representation in front of regulatory bodies related to consumer rights in technology and software
 6 purchases, (ii) file multiple petitions with regulatory bodies seeking to advance consumer rights in
 7 such purchases, and (iii) researching and publishing in-depth reports, online publications, and
 8 national media campaigns related to such issues. (See Proposal of Consumer Watchdog, attached
 9 as Exhibit 3.)¹

10 For the foregoing reasons, Plaintiff James Gross, individually and on behalf of the
 11 Settlement Class, respectfully requests that the Court enter an Order (i) approving the U.C.
 12 Berkeley Center for Law and Technology, The Rose Foundation, and Consumer Watchdog as *cy*
 13 *pres* recipients, and (ii) directing the distribution of a *cy pres* award (if any) to each recipient in an
 14 amount to be determined by the Court.

15 **IV. DEFENDANTS' PROPOSED CY PRES RECIPIENTS.**

16 Defendants propose that a *cy pres* distribution be awarded to three non-profit organizations
 17 that work to educate consumers about protecting themselves and their computers in an online
 18 world: (i) National Cyber Security Alliance, (ii) Girls STEM Network: Cybersecurity, and (iii)
 19 Common Sense Media. The class members in this action are all purchasers of software products
 20 designed to protect their computers from unwanted errors and to protect their Internet privacy. See
 21 ECF No. 50 ¶ 60. Plaintiff alleged that this software exaggerated the “health” of class members’
 22 computer systems and Internet privacy to induce class members who were uninformed about the
 23 actual state of their computers and Internet privacy to purchase a full license to the software. *Id.* ¶¶

25 ¹ It bears noting that Consumer Watchdog was recently selected and approved as an
 26 appropriate *cy pres* recipient in the case captioned *LaGarde v. Support.com, et al.*, No. 3:12-cv-
 27 00609-JSC (N.D. Cal.), previously pending in this District. Similar to this case, in *LaGarde* the
 28 Parties reached a classwide settlement of claims related to the alleged deceptive design and
 marketing of utility software. The *LaGarde* settlement was granted final approval on May 30th.

1 1-4. The potential *cy pres* recipients proposed by defendants provide services that have a
 2 “substantial nexus to the interests of the class members” and to the “nature of the plaintiffs’
 3 lawsuit” because these services help provide the education to the class that Plaintiff alleged class
 4 members lack regarding the health of their computer systems and Internet privacy. Accordingly,
 5 these proposed *cy pres* recipients are among “the ‘next best’ class of beneficiaries” to receive
 6 benefits under the settlement.

7 National Cyber Security Alliance (“NCSA”) has a mission “to educate and therefore
 8 empower a digital society to use the Internet safely and securely at home, work, and school,
 9 protecting the technology individuals use, the networks they connect to, and our shared digital
 10 assets.” *See* NCSA Proposal, attached as Exhibit 4. NCSA has lead a coalition of private
 11 companies, non-profits and government organizations in a global cybersecurity awareness
 12 campaign to help all digital citizens stay safer and more secure online, partnering with the U.S.
 13 government, including the White House, to promote a campaign recognized by President Barack
 14 Obama as the national cybersecurity awareness campaign during his Presidential Proclamation of
 15 National Cyber Security Awareness Month in 2010. *Id.* NCSA would use a *cy pres* distribution
 16 under the Settlement to (a) fund its National Data Privacy Day education events and campaigns;
 17 (b) fund its General Privacy Awareness Program; and (c) develop education and awareness events
 18 in connection with National Cybersecurity Awareness Month. *Id.*

19 Girls STEM Network: Cybersecurity (“GSNC”) is a non-profit program run by San José
 20 State University to “create opportunities for middle school-aged girls to learn how to protect the
 21 online environments of their families and communities by participating in cybersecurity-related
 22 programming in out-of-school settings.” *See* GSNC proposal, attached as Exhibit 5. GSNC would
 23 use its distribution from the Settlement to (a) fund instructor development content and pedagogy,
 24 (b) pay for the costs of program instruction, (c) purchase equipment and software for the program,
 25 (d) fund a convening for middle school Cybersecurity-focused, out-of school time providers, (e)
 26 host community events aimed at disseminating information about online security and involving
 27 participant parents, (f) pay the costs associated with dissemination of program model/results, (g)
 28

1 pay the printing costs associated with the program, and (h) fund the salary for evaluator and
 2 student research positions.

3 Common Sense Media (“CSM”) “is dedicated to improving the lives of kids and families
 4 by providing the trustworthy information, education, and independent voice they need to thrive in
 5 a world of media and technology.” *See* CSM Proposal, attached as Exhibit 6. CSM’s programs and
 6 products are used by thousands of schools, afterschool programs, and community-based
 7 organizations across the nation. *Id.* These programs are designed to “empower kids to think
 8 critically, behave safely, and participate responsibly in our 24/7 media world while providing
 9 adults the resources and tools to support them.” *Id.* CSM would use funds received from the
 10 Settlement for the continued development and national outreach of its groundbreaking Digital
 11 Literacy and Citizenship Education Programs and Products, which are offered free of charge to
 12 educators and families. *Id.*

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 16 Dated: August 6, 2013

EDELSON LLC

17 By: /s/ Benjamin H. Richman

18 Benjamin H. Richman

19 *Attorneys for Plaintiffs and the Putative Class*

20
 21 Dated: August 6, 2013

WILSON SONSINI GOODRICH & ROSATI
 Professional Corporation

22 By: /s/ Anthony J Weibell

23 Anthony J Weibell

24 *Attorneys for Defendants*

ECF CERTIFICATION

I, Anthony Weibell, am the ECF User whose identification and password are being used to file this document and attest that all signatories hereto have concurred in this filing.

Dated: August 6, 2013

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

By: /s/ Anthony J Weibell
Anthony J Weibell